SUPREME COURT, U. S.

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FILED
MAY 28 1964
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1246 1244

BENJAMIN H. SAUNDERS,
Executor of the Estate of Sophus Dee Hanson, deceased,

and

BARBARA ELIZABETH HANSON,
Sole Heir and Residuary Legatee under the Will of
Sophus Dee Hanson, deceased,

Petitioners,

v.

ANNE BAKER BEIN HANSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

ANNE BAKER BEIN HANSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on December 26, 1963, and a denial of Petition for Rehearing entered on February 28, 1964.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia is reported at 210 F. Supp. 377. The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, infra p. 1a, is reported at 327 F. 2d 889. —U.S. App. D.C. —.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

1. Where the putative widow elects to take against the Will of her deceased husband and claim her intestate share of the estate, do the executor of the deceased husband and/or the sole heir at law and residuary legatee under the Last Will and Testament of the deceased husband have the legal standing or capacity to demonstrate the invalidity of the putative widow's marriage to the decedent by showing that at the time of said marriage she was not validly divorced from an earlier husband because such divorce is not entitled to full faith and credit in the District of Columbia?

2. Does a divorce decree in favor of the innocent husband abate because of his death prior to the expiration of a six month statutory waiting period, so as to give his divorced spouse the right to claim a statutory share in his estate, where the decree is final in all respects except for the passage of time? If so, do the findings in said decree constitute res judicata and judgment by estoppel against the decedent and his privies in a contest over the rights to his estate?

CONSTITUTION AND STATUTES INVOLVED

U.S.C.A. Const., Art. 4, § 1

"Section 1. Full Faith and Credit shall be given in each State to the public Arts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 16, Section 421, District of Columbia Code, 1961

"§ 16-421. When decree for annulment or absolute divorce effective.

"No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the expiration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date. (Mar. 3, 1901, ch. 854, § 983a, as added Apr. 19, 1920, 41 Stat. 567, ch. 153, § 1, and amended Aug. 7, 1935, 49 Stat. 540, ch. 453, § 4.)"

Title 18, Section 211, District of Columbia Code, 1961

"§18-211. Renunciation of devises and bequests to spouse — Form. — Limitation—Interest to be taken by widow upon such renunciation.

"Subject to the provisions of section 18-212, a widow or widower shall be barred of any rights or interest she or he may have in real or personal estate by any such devise or bequest unless within six months after administration may be granted on the deceased spouse's estate she or he shall file in the probate court a written renunciation to the following effect:

I, A.B., widow or widower of .....
late of ....., deceased, do hereby renounce and quit all claim to any devise or bequest

made to me by the last will of my husband or wife exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal estate of my said spouse.

If, during said period of six months, a suit should be instituted to construe the will of the husband or wife, the period of six months for the filing of such renunciation shall commence to run from the date when such suit shall be finally determined, by appeal or otherwise.

By renouncing all claim to any and all devices and bequests, made to her or him by the will of her husband or his wife, the surviving spouse shall be entitled to such share or interest in the real and personal estate which she or he would have taken had the deceased spouse died intestate. Except in cases of valid antenuptial or postnuptial agreements, and except in cases when it is expressly waived in a writing filed with the probate court within said six months period, this provision for the surviving spouse shall apply with like effect (without formal renunciation) to cases where the wife or husband has made no devise or bequest to her husband or his wife, and also to cases where nothing passes by such devise or bequest. (Mar. 3, 1901, 31 Stat. 1376 ch. 854, § 1173; Apr. 19, 1920, 41 Stat. 567, ch. 153; Aug. 31, 1957, 71 Stat. 561, Pub. L. 85-244, § 6.)"

Title 18, Section 212, District of Columbia Code, 1961

"§ 18-212. Rights of surviving spouse if there is no renunciation.

"If the surviving spouse does not renounce as provided in section 18-211, she or he shall be entitled to receive the benefit of all provisions in her or his favor in the will of the deceased spouse and shall share, in accordance with section 18-101, 18-701, 18-702, 18-703 and 18-704, in any estate of the deceased spouse undisposed of by the will. (Mar. 3, 1901, 31 Stat. 1377 ch. 854, § 1174; Aug. 31, 1957, 71 Stat. 561, Pub. L. 85-244, § 7.)"

Title 30, Section 101, District of Columbia Code, 1961

"§ 30-101. Prohibitions—Marriage void ab initio.

"The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely:

First. The marriage of a man with his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter.

Second. The marriage of a woman with her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's, son, sister's son.

Third. The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce. (Mar. 3, 1901, 31 Stat. 1381, ch. 854 § 1283.)"

STATEMENT OF THE CASE

On September 1, 1934, in Baltimore, Maryland, respondent, Anne Roberts Baker (hereinafter referred to as "respondent") was lawfully married to one Raymond Bein. Respondent and Raymond Bein lived as man and wife in the District of Columbia until May, 1944, when they separated. Respondent was employed in the Tax Division of the Department of Justice in the District of Columbia since March, 1937. During this period of time respondent and Raymond Bein never lived in Florida or any place other than the District of Columbia.

In October, 1944, respondent took annual leave from her job in the Department of Justice and went to Miami, Florida. In December, 1944, while still in Florida, she was transferred to an on-leave-without-pay status by the Department of Justice in the District of Columbia. Near the end of January, 1945, she consulted an attorney and on the 3rd day of February, 1945, she filed a Bill of Complaint for divorce from Raymond Bein in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, In Chancery No. 89623. Service of the Bill of Complaint was obtained upon Raymond Bein by publication and he never entered an appearance in that proceeding. On the 9th day of March, 1945, respondent testified before a Special Master in Chancery that she held a permanent position of employment in the State of Florida and intended to make Florida her permanent home. Based upon the aforesaid testimony, the Special Master in Chancery made a finding of fact that the Circuit Court for the Eleventh Judicial Circuit of Florida in and for Dade County had jurisdiction over the parties and the marriage *res*. On the 16th day of March, 1945, respondent was granted a final decree of divorce from Raymond Bein by the aforesaid Court and her maiden name was restored to her. On the 3rd day of April, 1945, respondent resumed her duties in the Tax Division in the Department of Justice in the District of Columbia and has thereafter continued to be a resident of the District of Columbia.

On the 22nd day of August, 1949, respondent and petitioners' decedent, Sophus Dee Hanson, obtained a marriage license and celebrated the rites of marriage in the District of Columbia. On the marriage license application respondent relied upon her 1945 Florida divorce decree as dissolving her prior marriage to Raymond Bein. On the 20th day of November, 1956, without any justification or excuse, respondent discontinued living with the decedent and departed from the marital home without his consent

and continuously lived separate and apart from him during the remainder of his lifetime. On the 5th day of February, 1957, Mr. Hanson executed a Last Will and Testament in which he made the following bequest:

> "2. I bequeath and devise to my *putative* wife, Anne Baker Bein Hanson—whose divorce obtained on March 16, 1945, from Raymond Bein in the Circuit Court, Miami, Dade County, Florida, was and is solely exparte, fraudulent and illegal, except in the State of Florida—the sum of $5.00 with the stipulation that if she in anywise contests this will, then she shall receive and take nothing hereunder."

Decedent left the residue of his estate to his only child, Barbara Elizabeth Hanson, a daughter by a prior marriage, a petitioner herein.

On the 22nd day of July, 1959, the Domestic Relations Branch of the Municipal Court for the District of Columbia granted Mr. Hanson an absolute divorce from respondent on the grounds of desertion. No appeal was taken from this decree. On the 10th day of January, 1960, 12 days before the said divorce decree became final, Mr. Hanson died.[1] The aforesaid Last Will and Testament was admitted to probate by the United States District Court for the District of Columbia, Holding a Probate Court, and Letters Testamentary were issued to Benjamin H. Saunders, the nominated executor, a petitioner herein. Thereafter, on the 19th day of July, 1960, respondent filed a renunciation of the bequest to her under the Will and requested payment of her intestate share as the decedent's widow in accordance with the provisions of Title 18, Section 211, of the District of Columbia Code.

The executor and daughter of the decedent opposed the renunciation and election of the putative widow and filed a

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[1] Title 16 Section 421, District of Columbia Code, 1961.

complaint for a declaratory judgment to determine her status and rights in the decedent's estate. On the 4th day of November, 1962, the District Court entered summary judgment in favor of respondent, wherein the Court determined that the executor and/or daughter of the decedent did not have the legal standing to demonstrate the invalidity of respondent's *ex parte* Florida divorce from her first husband. The District Court's opinion appears at 210 F. Supp. 377. The Court of Appeals affirmed on the basis of the District Court's opinion 327 F. 2d 889, — U.S. App. D.C. —, rehearing denied February 28, 1964.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Under the Full Faith and Credit Provisions of the Constitution.

The District Court, in granting respondent's Motion for Summary Judgment, found that respondent's 1945 Florida divorce decree from her first husband was obtained in an *ex parte* proceeding wherein respondent's husband was neither personally served with process nor entered an appearance. There was no "participation" by the parties in the Florida Court which would have afforded the safe guards of due process of law on the jurisdictional requirements consistent with this Court's rulings in *Coe* v. *Coe*, 334 U.S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451 and *Sherrer* v. *Sherrer*, 334 U.S. 345, 68 S. Ct. 1087, 92 L. Ed. 1429. Under these circumstances, the District Court believed that it had the power to review the question of whether the Florida Court had jurisdiction at the time of granting respondent's divorce and to refuse it full faith and credit, on the basis of *Williams* v. *North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, but declined to do so because the law of Florida would not permit the petitioners to make a collateral attack upon said decree, citing *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552, and *DeMarginy* v. *DeMarginy*, (S. Ct. of Florida) 43 So. 2d 442.

The Courts below fail to recognize and give effect to Title 30, Section 101, District of Columbia Code, 1961, which clearly permits the showing of a prohibited marriage in *any* collateral proceeding. The Courts assumed that the right to demonstrate the nullity of a marriage void *ab initio* is limited or restricted by the laws of some other jurisdiction. The statute, however, contains no such limitation, and, indeed, provides that such marriages, as in the instant case between petitioner's decedent and the respondent," . . . shall be void *ab initio* without so being decreed and their nullity may be shown in any collateral proceeding...."

The petitioners were entitled under the aforesaid Title 30, Section 101, to oppose respondent's election to take against the Will by demonstrating that her marriage to petitioners' decedent was prohibited because she was not legally divorced from her first husband at the time of marrying petitioner's decedent in the District of Columbia. Whether this showing might also constitute a collateral attack on respondent's Florida divorce decree is incidental, only, and should not proscribe petitioners' rights under Title 30, Section 101. This is substantially different from an attempt by a stranger to make a collateral attack upon a decree of a sister state. Here we are only concerned with opposing the claim of a putative widow who has elected to take against the Will and in effect is relying upon and seeking to enforce an invalid decree, the product of her fraud upon the Florida Court. This is clearly a collateral proceeding as contemplated by Title 30, Section 101. If the right to demonstrate the nullity of a prohibited marriage in the District of Columbia is dependent upon the laws of sister states governing collateral attacks upon its decrees, then the statute has lost its effect and purpose. Such a limitation obviously was not intended by Congress since it provided that prohibited marriages shall be void *ab initio,* without the necessity of being so decreed.

The marriage, void *ab initio* in the District of Columbia, does not become valid because the laws of Florida will not permit petitioner the right to question whether the Florida Court had jurisdicition at the time of granting respondent's divorce from her first husband. Assuming however that these proceedings constitute a collateral attack upon respondent's Florida divorce decree, the case of *State Ex Rel Willys* vs. *Chillingsworth*, 124 Fla. 274, 168 So. 249, clearly gives petitioner Barbara Elizabeth Hanson the right to question the validity of respondent's Florida divorce. Petitioners' standing to make this attack under the District of Columbia law is founded on *Sears* v. *Sears*, 110, U.S. App. D.C. 407, 293 F. 2d 884 and *De Parata* v. *De Parata*, (Mun. App. D.C.) 179 2d 723. *Johnson* v. *Muelberger*, supra, is easily distinguishable on its facts. The principles of res judicata extended to third party strangers to the Florida decree clearly are not applicable here. Also see, *Aiello* v. *Aiello*, 272 Ala. 505, 133 So. 2d 18.

II. The District of Columbia Divorce Decree Between Respondent and Petitioners' Decedent Was Not Abated by the Death of Petitioners' Decedent.

The Court below held that the divorce decree by the District of Columbia Court, dated July 22, 1959, granting petitioners' decedent a divorce from the respondent, abated by the death of petitioners' decedent 12 days before the expiration of six months from the date of the decree. Citing Title 16, Section 421, District of Columbia Code, 1961, and *Wesley* v. *Brown*, 90 U.S. App. D.C. 351, 196 F. 2d 859. However, Judge Burger, in the concurring opinion below demonstrated the fallacy of such interpretation of Section 421 and suggested that the Court re-examine the holding in *Wesley* v. *Brown*. Judge Burger points out that the legislative history of Section 421 shows that the purpose in requiring a six month period before a decree becomes final was to prevent the District of Columbia from becoming

a divorce mill. No provision was made for an *order nisi*, the usual means of providing for conditional-type divorce decrees. Under the existing language no further action or order is required to make the decree of divorce final. See, 79 Congressional Record 11587 (1935). Divorce statutes in many other jurisdictions become final upon entry or the expiration of the time for an appeal, with a specific prohibition against remarriage for a prescribed period of time. However, Courts in some jurisdictions have construed similar language to Title 16, Section 421 as meaning that the sole purpose of the six month waiting requirement is to prohibit remarriage only and that the decree takes effect the same as any other judgment. See cases cited in Footnote No. 4 to Judge Burger's concurring opinion below, infra p. 5a.

There is no plausible reason for the *Wesley* interpretation of Section 421. Public policy is not involved. It does not inure to the benefit of the parties nor to the administration of justice. It permits and perhaps requires an appeal within 30 days of the entry of the divorce decree, as a *final* order, *Roberts* v. *Roberts*, 95 U.S. App. D.C. 382, 222 F. 2d. 408; *Lort* v. *Lort*, 91 U.S. App. D.C. 118, 198 F. 2d 598, but refuses to give the *final* order any recognition if either party does not survive for six months thereafter. There is authority for the proposition that the statute was not intended to be applied so broadly. *Tillinghast* v. *Tillinghast*, 58 App. D.C. 107, 25 F. 2d 531 (1928); *Oliver* v. *Oliver*, 87 U.S. App. D.C. 334, 185 F. 2d 429 (1951); *Steele* v. *Steele*, 65 F. Supp. 329 (D.D.C. 1946).

Notwithstanding the holding that the divorce abated by the death of the petitioners' decedent prior to it becoming final, the Courts below held that the said divorce decree, reciting the marriage in the District of Columbia between respondent and petitioners' decedent on August 26, 1949, constituted res judicata and judgment by estoppel as to the validity or existence of said marriage. In other words,

the divorce decree was sufficiently *final* to accord the respondent the benefits of a final adjudication on the validity and existence of her marriage but had no final effect to dissolve her marriage. The decree should not be considered as binding and res judicata in some respects and a nullity in others.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1964

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17508

BENJAMIN H. SAUNDERS, Executor, Estate of Sophus Dee Hanson, deceased, et al., APPELLANTS,

v.

ANNE BAKER BEIN HANSON, APPELLEE.

Appeal from the United State District Court
for the District of Columbia

Decided December 26, 1963

Mr. John A. Beck, with whom *Mr. Ellis N. Slack* was on the brief, for appellants.

Mr. John Alexander, with whom *Mr. Walter W. Johnson, Jr.*, was on the brief for appellee.

Before EDGERTON, *Senior Circuit Judge*, and DANAHER AND BURGER, *Circuit Judges*.

PER CURIAM: This appeal involves the right of appellee to receive a statutory share of the estate of her former husband, who died within six months after the entry of a decree of divorce but before that decree became final

under D. C. CODE § 16-421 (1951). The statute says "no such final decree [for absolute divorce] shall become absolute and take effect until the expiration of six months after its date." This court in *Oliver* v. *Oliver,* 87 U.S. App.D.C. 334, 336, 185 F.2d 429, 431 (1950), pointed out:

> "This contemplates a provisional decree of divorce only, which cannot mature and become effective until lapse of the intervening time."

We held in *Wesley* v. *Brown*[1] that death of one of the parties during the six-month period following a divorce decree abated the action. Again, in *Dillard* v. *Dillard,*[2] discusing the underlying policy of our law, we said the District of Columbia statute

> "adopts and clearly expresses the broad policy of postponing for six months, *and for all purposes,* the effective date of any decree of absolute divorce granted in the District of Columbia." (Emphasis added.)

It is our view that the District Court, Tamm, *J.*, clearly discerned and applied the law as interpreted by repeated decisions of this court.

Other contentions advanced on brief and in argument have been sufficiently treated in the opinion [3] of the District Judge. The Judgment is

Affirmed.

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[1] 90 U.S.App.D.C. 351, 196 F.2d 859 (1952).

[2] 107 U.S.App.D.C. 214, 218, 275 F.2d 878, 882 (1960).

[3] In re Hanson's Estate, 210 F. Supp. 377 (1962).

BURGER, *Circuit Judge, concurring specially:* I agree that our holding in *Wesley* v. *Brown*, 90 U.S. App.D.C. 351, 196 F.2d 859 (1952), was binding on the district court and requires an affirmance with respect to the construction of D.C. CODE ANN. § 16-421 (1961).[1] However, the holding in *Wesley* v. *Brown* seems ill-considered since its construction of the statute went far beyond the congressional purpose and here would allow a spouse, who should certainly be considered divorced for these purposes, to take as the lawful surviving spouse as though no divorce had occurred, simply because the sixth month waiting period had a few more days to run. That paradoxical result was neither sound nor necessary under a statute meant only to deter hasty divorces and hasty remarriage.

Sophus D. Hanson died domiciled in Washington, D.C., on January 10, 1960, leaving $5 to his divorced wife, Anne Baker Bein Hanson, the appellee, and the entire residue to a daughter of his prior marriage. Six months lacking 12 days before his death, Hanson had been granted a decree of absolute divorce from appellee but pursuant to Section 16-421 that decree provided that it could not become effective until six months from the date of its entry. Appellee had sought the divorce but it was denied her and granted to Hanson on grounds of desertion. The court denied appellee any alimony or a share of Hanson's estate.

Arbitrary results are often a necessary concommitant of statutes which provide for the determination of legal

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[1] The D.C. Code provides:

"No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the expiration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date."

rights with respect to a fixed period of time, but invariably the seemingly arbitrary result serves the statutory end. See, *e.g.*, *United States* v. *Robinson*, 361 U.S. 220 (1960). Here the purpose of the statute is fully effectuated when it prevents remarriage within six months after the decree; it should have no other consequence. Some jurisdictions accomplish this same objective by a statute which simply and directly prohibits remarriage within a certain period, without more. See, *e.g.*, VA. CODE ANN. § 20-118 (1960); W. VA. CODE ANN. § 4722 (1961). I would treat Section 16-421 as if it so provided and confine its operation to its intended purpose by precluding either spouse from sharing in the estate of the other who dies *after* the final decree has actually been entered but during the six month period.[2] To grant to the spouse in these circumstances the same rights as an *undivorced* spouse, to me tends not to enhance or strengthen but rather to debase the marital relationship.

In reaching its holding in *Wesley* v. *Brown*, *Supra*, I suggest with all deference, that this court did not give full and adequate consideration to the basic problem involved. The very brief opinion tells us little except that *Oliver* v. *Oliver*, 87 U.S.App.D.C. 334, 185 F.2d 429 (1950), "is . . . dispositive." The *Oliver* case held void a foreign remarriage contracted within six months after the entry of the local decree. In reaching that result in the *Oliver* case this court considered the legislative history of Section 16-421 and noted that "other statements by members of the [House] Committee clearly indicate that the provision was intended as a barrier to hasty and fraudulent divorces." 87 U.S.App.D.C. at 337, 185 F.2d at 432.[3]

Our examination of a statute should be a search for meaning. Clearly, the meaning and purpose of Congress was, as its records show, to prevent "easy divorce *and*

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[2] See 39 GEO. L.J. 332, 334 (1951).

[3] See 79 CONG. REC. 11587 (1935) (remarks of Representative Carpenter, the bill's sponsor).

hasty remarriage of divorced persons." 87 U.S.App.D.C. at 338, 185 F.2d at 433. (Emphasis added.) That purpose is not served in the slightest by permitting a "divorced" spouse the same inheritance rights as a *surviving* spouse simply because the six month period, which was intended only to prohibit remarriage, has twelve days to run. As I see it, the congressional purpose and the underlying public policy is fully satisfied without the illogical and incongruous result we now feel compelled to reach here. Except for the restraint on remarriage during the six month waiting period, the parties should be regarded or all other purposes as divorced persons.[4]

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[4] *Cf.* Brown v. Brown, 97 F. Supp. 237 (D.D.C. 1950) (dictum). *But see* Fleischhauer v. Hazen, 69 Wash. L. Rep. 221 (D.D.C. 1941), in which the district court awarded pension payments to decedent's first wife, although the husband had died subsequent to entry of an "absolute decree" but prior to expiration of the six months; the court cited no cases nor the statute and may have been influenced by the fact that the other claimant was a purported second wife who asserted the validity of a Virginia divorce, obtained by deceased from his first wife, which the court found void because secured by "the fraud practiced on [the] court by the decedent."

Oklahoma and Kansas have adopted identical statutory provisions, similar to D.C. CODE § 16-421, declaring that divorce decrees shall not take effect until six months after the decree is entered; see KAN. GEN. STAT. ANN. § 60-1514 (1949); OKLA. STAT., tit. 12 § 1280 (1961). The supreme courts of both states for over sixty years and without exception have applied these provisions only to a remarriage context, reasoning that because "the sole purpose of the statutory provision . . . is to prevent the parties from remarrying within that period . . . ; for all other purposes the decree takes effect the same as any other judgment." First Nat. Bank v. Springfield Fire & Marine Ins. Co., 104 Kan. 278, 280, 178 Pac. 413, 414 (1919). For cases construing the Kansas statute, see Durland v. Durland, 67 Kan. 734, 74 Pac. 274 (1903); Jacobs v. Gaskill, 69 Kan. 872, 77 Pac. 550 (1904) (per curiam); Woolverton v. Johnson, 69 Kan. 708, 77 Pac. 559 (1904); Johnson v. Grand Lodge AOUW, 91 Kan. 314, 137 Pac. 1190 (1914); Knollenberg v. Meyer,

The limited purpose of the statute was recognized in *Steele* v. *Steele*, 65 F. Supp. 329, 332 (D.D.C. 1946), in

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151 Kan. 768, 100 P.2d 746 (1940); Pickard v. Pickard, 241 Iowa 1307, 45 N.W.2d 269 (1950) (applying Kansas statute); King v. Klemp, 26 N.J. Misc. 140, 57 A.2d 530 (Ct. Chanc. 1947) (same); In re Troemper's Estate, 160 Kan. 464, 163 P.2d 370 (1946) (dictum). For cases construing the Oklahoma statute, see In re Smith, 2 Okla. 153, 37 Pac. 1099 (1894); Barnett v. Frederick, 330 Okla. 49, 124 Pac. 157 (1912); Brown v. Capps, 164 Okla. 91, 22 P.2d 1008 (1953); In re Trent's Claim, 68 Wyo. 146, 231 P.2d 181 (1951) (construing Oklahoma statute); Bauer v. Abrahams, 73 Colo. 509, 216 Pac. 259 (1923) (construing both statutes); In the Matter of Estate of Sanders, 147 Cal. App. 2d 450, 305 P.2d 655 (Dist. Ct. App. 1957) (construing Oklahoma statute); Perkins v. Perkins, 237 S.W.2d 659 (Tex. Ct. Civ. App. 1951) (same); Green v. McDowell, 210 Mo. App. 515, 242 S.W. 168 (Ct. App. 1922) (per curiam) (construing both statutes); *cf.* In re Harper's Estate, 1 Utah 2d 296, 265 P.2d 1005 (1954). *But see* Holmberg v. Holmberg, 106 Neb. 717, 184 N.W. 134 (1921); Soverign Camp W.O.W. v. Billings, 107 Neb. 218, 185 N.W. 426 (1921); Williams v. Williams, 146 Neb. 383, 19 N.W.2d 630 (1945); In re Troemper's Estate, *supra*, (dictum).

Many states held that the death of one spouse subsequent to an interlocutory or nisi divorce decree but prior to a final decree destroys the marital relationship, thereby abating the original action and rendering impossible the issuance of or ripening into a subsequent absolute divorce decree. See, *e.g.*, Morris v. Propst, 98 Colo. 213, 55 P.2d 944 (1936); Chase v. Webster, 168 Mass. 228, 46 N.E. 705 (1897). These cases are collected and digested at 104 A.L.R. 654-63 (1936); 158 A.L.R. 1205-209 (1945); 2 A.L.R. Blue Book Supp. Dec. 705 (1952); 3 A.L.R. Blue Book Supp. Dec. 651 (1958); 1953 A.L.R. Blue Book Supp. Dec. 498. *But cf.* In re Harper's Estate, *supra*. Significantly, the statutes involved in these cases provide for initial conditional-type divorce decrees, sometimes denominated interlocutory, sometimes nisi, which the House Report accompanying D.C. CODE § 16-421 as an amendment specifically noted it was eliminating: "This bill makes no provision for an interlocutory decree [as did the then present law] . . . ." H. REP. No. 1532, 74th Cong., 1st Sess. 4 (1934). *But cf*, 79 CONG. REC. 11587 (1935) (remarks of Representative McCormack).

which the divorce decree was viewed as severing the marital bond immediately upon its entry so as to allow the divorced wife to sue the divorced husband in tort for acts which occurred within the six month period before the decree was final. Had the court considered the parties married after the entry of the divorce decree, the one spouse could not have sued the other in tort. In *Tillinghast* v. *Tillinghast*, 58 App.D.C. 107, 110, 25 F.2d 531, 534 (1928), this court, construing Section 983a of the D.C. Code in effect in 1928, with essentially the same language as is found in Section 16-421, held that facts—the death of one party—arising after a decree (in that case for annulment) but before the expiration of the interlocutory period for taking an appeal operated to make the decree final in order to avoid illegitimacy of off-spring of the remarriage of one party.[5]

It is not without significance that we have long treated the date of the *entry* of a divorce decree as fixing the time for appeal as from a final order. See, *e.g.*, *Roberts* v. *Roberts*, 95 U.S.App.D.C. 382, 222 F.2d 498 (1955) (decree entered April 26, 1954; notice of appeal filed May 11, 1954); *Lort* v. *Lort*, 91 U.S.App. D.C. 118, 198 F.2d 598 (1952) (decree entered May 9, 1951; notice of appeal filed June 8, 1951). See also H.R. Rep. No. 1532, 74th Cong., 1st Sess. 4 (1934).

In the *Oliver*, *Tillinghast* and *Steele* cases dealing with this statutory language prior to the *Wesley* holding, the courts have carefully confined the impact of the statute

[5] The majority opinion cites dictum from Dillard v. Dillard, 107 U.S.App.D.C. 214, 218, 275 F.2d 878, 882 (1960), which involved construction of Virginia's divorce laws, not Section 16-421 of the District of Columbia Code. Indeed, the court in *Dillard* specifically noted that the issue in the *Oliver* case "related only to remarriage," 107 U.S.App.D.C. at 219, 275 F.2d at 883, and that the *Oliver* and *Wesley* cases "provide[d] no guidance in the instant [*Dillard*] case arising under a Virginia statute." *Id.* at n. 8.

to its objective of deterring hasty divorce and hasty remarriage. Only in the *Wesley* case was the statute given effect beyond its intended purpose. My view that the *Wesley* holding was not as carefully considered as the earlier cases and perhaps not as carefully as the subject merited is buttressed by the fact that neither the *Steele* nor the *Tillinghast* cases, *supra*, were cited. Indeed, an examination of our records discloses that the briefs in the *Wesley* case failed to bring these cases to this court's notice. Nor was any reference made to the fact that we had long considered divorce decrees final for appeal purposes when entered, rather than six months later.

We ought not strain, as I think was done in the *Wesley* case, to construe a statute to produce an anomalous and unreasonable result. The *Tillinghast* opinion, in drawing away from the literal language of the D.C. Code provision reminded that "it is well-settled law that, where a strict construction of a statute leads to injustice, absurdity, and incongruity, the court will look to the purpose and the spirit of the statute in declaring its effect." 58 App.D.C. at 109, 25 F.2d at 533.

I suggest we should re-examine our *Wesley*[6] holding in light of this principle of statutory construction.

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[6] Both parties now before us apparently assumed that the *Welsey* holding was binding on this issue and therefore argued the case on other grounds; they did not brief or argue the central point which I urge in this opinion. In that posture the District Judge had no occasion to deal extensively with this issue as he did with other points in his exhaustive opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 124

BENJAMIN H. SAUNDERS,
Executor of the Estate of Sophus Dee Hanson, deceased

and

BARBARA ELIZABETH HANSON,
Sole Heir and Residuary Legatee under the Will of
Sophus Dee Hanson, deceased, *Petitioners*,

v.

ANNE BAKER BEIN HANSON, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1156

BENJAMIN H. SAUNDERS,
Executor of the Estate of Sophus Dee Hanson, deceased

and

BARBARA ELIZABETH HANSON,
Sole Heir and Residuary Legatee under the Will of
Sophus Dee Hanson, deceased, *Petitioners*,

v.

ANNE BAKER BEIN HANSON, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 210 F. Supp. 377. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 327 F. 2d 889, — U.S. App. D.C. —.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was dated December 26, 1963. Petition for rehearing *en banc* was denied by that Court *en banc* on February 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Should this Court review the long settled case law of the District of Columbia that upon the death of one of the parties prior to the passage of the statutory six months period from the entry of a divorce decree, the divorce is abated and the other party is the surviving spouse?

2. Should this Court again review the well established principle that where the decedent himself was estopped to raise certain issues, the petitioners, as his privies, are also estopped?

3. Should this Court again review the well established principle that where the petitioners would have had no standing in the courts of the State of Florida to seek to attack respondent's prior Florida divorce, the petitioners could not do so in the courts of the District of Columbia?

CONSTITUTION AND STATUTES INVOLVED

The respondent accepts the statement by the petitioners as to the provisions of the Constitution and of the statutes involved.

STATEMENT OF THE CASE

The respondent adopts for her Statement of the Case the facts as found in the Memorandum Opinion of the trial court, reported at 210 F. Supp. 377. (See also Joint Appendix filed herein, pp. 89-91).

Additionally, the petitioners (as appellants below) by their brief presented to the Circuit Court below only the

first question as set forth in their pending petition, and not the two additional questions stated under heading "2." of their pending petition. Only upon their petition for rehearing by the court below, *en banc*, were such questions raised below by these petitioners. By its order of February 28, 1964, the Circuit Court below *en banc* denied a rehearing.

REASONS FOR DENYING THE WRIT

1. It Is Settled Law Under the District of Columbia Statute That the Divorce Between Petitioners' Decedent and Respondent Abated Upon the Death of Petitioners' Decedent

The Circuit Court opinion in affirming this case below sets forth:

> "* * *. The Statute says 'no such final decree (for absolute divorce) shall become absolute and take effect until the expiration of six months after its date.' This court in *Oliver* v. *Oliver*, 87 U.S. App. D.C. 334, 336, 185 F. 2d 429, 431 (1950), pointed out:
>
> > 'This contemplates a provisional decree of divorce only, which cannot mature and become effective until lapse of the intervening time.'
>
> 'We held in *Wesley* v. *Brown*' (90 U.S. App. D.C. 351, 196 F. 2d 859, 1952), 'that death of one of the parties during the six month period following a divorce decree abated the action. Again, in *Dillard* v. *Dillard*,' (107 U.S. App. D.C. 214, 218, 275 F. 2d 873, 882, 1960) 'discussing the underlying policy of our law, we said the District of Columbia statute
>
> > 'adopts and clearly expresses the broad policy of postponing for six months, *and for all purposes*, the effective date of any decree of absolute divorce granted in the District of Columbia.' (Emphasis added.)"

The actual language of the statute concerned, Title 16, Section 421, District of Columbia Code, 1961, is in material part that "No final decree—dissolving a marriage shall be effective to —dissolve the marriage until the expiration of

the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date."

The petition (p. 11) argues that there is "no plausible reason for the *Wesley* interpretation" of this section of the law, and that "Public policy is not involved."

The respondent asserts on the contrary that there is a "plausible reason", and that public policy is involved. The legislature chose that particular language, and the language is clear and unambiguous. Just prior to the enactment of that present statutory provision, this Court had held in *Loughran* v. *Loughran*, (1934), 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219, rehearing denied 292 U.S. 615, 54 S. Ct. 861, 78 L. Ed. 1474, that a mere prohibition against remarriage in a divorce decree has no extra-territorial effect, and that a remarriage outside of the jurisdiction granting the divorce is valid, despite a prohibition of remarriage in the decree of divorce.

By adopting the statutory language here involved, the legislature insured that there could be no valid remarriage anywhere, because the decree did not become effective to dissolve the marriage until the passage of six months. Certainly such a public policy, of making hasty remarriage impossible, was within the power of the legislature to adopt, and the statute enacted certainly serves the public policy sought to be effectuated.

As seen from the opinion of the Circuit Court below, in the cases there cited, it is settled law in the District of Columbia that the decree did not become operative to dissolve the marriage of the respondent and petitioners' decedent, and it abated upon the death of the petitioners' decedent. That Court, en banc, refused to reconsider this case, and its prior decision on this point. Even Judge Burger, in his

concurring opinion below (see Appendix A of petitioner's brief, p. 3a) stated that he agreed that the "holding in *Wesley* v. *Brown*, 90 U.S. App. D.C. 351, 196 F. 2d 859 (1952), was binding on the district court and requires an affirmance with respect to the construction of the D. C. Code Ann. S. 16-421 (1961)."

2. It Is Settled Law That Where Petitioners' Decedent During His Lifetime Was Estopped to Question the Validity of His Marriage to Respondent and of Respondent's Prior Florida Divorce, the Petitioners, As His Privies, Are Also Estopped

It is significant that the petitioners do not here address themselves at all to the matter of the question of estoppel of the petitioners, as privies of the decedent, to question the validity of the marriage between the respondent and their decedent. The district judge in his opinion (See Joint Appendix, pages 101 and 102) recited the facts establishing the estoppel, and held that the doctrine of estoppel "clearly applies in the present case". As the district court opinion pointed out (Joint Appendix, pages 102 and 103, including footnote 3), the petitioners were in privity with the decedent, and all privies are estopped from litigating that which is conclusive with whom they are in privity. This Court has often affirmed that doctrine (See cases cited, Joint Appendix, page 103, footnote 3), and it is settled law.

The Circuit Court in affirming below, clearly expressed its approval of the opinion of the trial court. Even Circuit Judge Burger, in concurring specially (See: Footnote 6), termed the trial court's opinion as "exhaustive." Respondent believes it should be emphasized here that although Judge Burger believed the Wesley case should be reconsidered by the Circuit Court, he did not address himself whatsoever to the question of estoppel. The matter of estoppel, by itself, should be dispositive of this cause.

3. It Is Settled Law That the Petitioners Could Not Attack Respondent's Prior Florida Divorce in the District of Columbia, Because They Would Have Had No Standing to Attack the Florida Decree in the Courts of the State of Florida

The petitioners strain the facts and the applicability of Section 30-101, D.C. Code (1961) to assert that this case presents important questions under the full faith and credit clause of the Constitution.

Only by totally ignoring the full faith and credit clause of the Constitution could Section 30-101, D.C. Code be given the effect urged by petitioners (Brief, bottom p. 9). The petitioners assert that "Whether this—might also constitute a collateral attack on respondent's Florida divorce decree is incidental only—." They assert that the local statute has lost its effect and purpose, if it is dependent upon the laws of sister states governing collateral attacks upon their decrees. In effect, petitioners argue that the full faith and credit provision of the Constitution must give way to this enactment of Congress. On its face that is a fallacious argument.

The petitioners then argue, p. 10, that even if their complaint below constituted a collateral attack upon the respondent's Florida divorce decree, that the petitioners have such standing to make such an attack under the law of Florida, citing and relying solely upon *State Ex Rel Willys* v. *Chillingsworth*, 124 Fla. 274, 168 So. 249. Petitioners then assert that this Court's decision in *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552, "is easily distinguishable on its facts." Petitioners, however, fail to tell us how it can be so easily distinguished on its facts.

The petitioners' assertion that the *Chillingsworth* decision, *supra*, "clearly gives petitioner Barbara Elizabeth Hanson the right to question the validity of respondent's Florida divorce" is misleading, at the least. That decision never has been followed by the Supreme Court of Florida in its seven decisions since *De Marginy* v. *De Marginy*

(Florida), 43 So. 2d 442, decided *en banc*, which held that a daughter had no standing to make a collateral attack upon the prior Florida divorce of her step-mother from her father. Further, regarding petitioners' assertion, *Johnson* v. *Muelberger, supra*, clearly stated that *State Ex Rel Willys* v. *Chillingsworth, supra*, "does not so hold," and that "—late opinions of Florida indicate that the child had a mere expectancy at the time of the divorce."

Clearly the present petitioners had no interest nor standing whatsoever at the time the respondent obtained her Florida divorce from her first husband, and could not attack said decree in the courts of Florida. Extending the same faith and credit to the Florida decree in the courts of the District of Columbia, as it is entitled to in the courts of Florida, the courts below in this case correctly applied the requirements of the full faith and credit clause of the Constitution.

The petitioners' also assert that their standing to make this attack under the District of Columbia law is founded on *Sears* v. *Sears*, 110 U.S. App. D.C. 407, 293 F. 2d 884 and *De Parata* v. *De Parata*, (Mun. App. D.C.) 179 A. 2d 723.

The *Sears* case is completely distinguishable in that it involved a Mexican mail order ex parte divorce concerning which the full faith and credit clause had no possible application.

The *De Parata* decision also is clearly distinguishable. In the *De Parata* opinion the appellate court held that the Alabama divorce was subject to attack in the District, because "the Alabama Supreme Court has specifically held that for want of domiciliary jurisdiction, divorce decrees of that State are not entitled to full faith and credit in other jurisdictions", citing *Hartigan* v. *Hartigan*, 272 Ala. 67, 128 So. 2d 725. It must be added that in *Hartigan*, the Alabama Supreme Court also held that such "quickie" one day

divorces were not entitled to any faith or credit even in the State of Alabama, let alone elsewhere.

In contrast to Sears and De Parata, here there was no factual issue whatsoever concerning this respondent's full compliance with the jurisdictional requirements of Florida's law as to her residence there in connection with that divorce. The trial court's decision in this case was rendered on motions by both sides for summary judgment. The sole evidence before the trial court consisted of depositions (including the respondent's) taken by the petitioners. (See: Joint Appendix, pages 17-46). Such evidence completely supported the bona fides of this respondent's residence in Florida prior to her divorce there from her first husband. Nothing to impeach or contradict this evidence was ever offered below by these petitioners.

The petitioners fail to show that this case presents any "important questions under the full faith and credit provision of the Constitution." They similarly fail to show any reason why this Court should reconsider its decision in *Johnson* v. *Muelberger, supra.*

CONCLUSION

In conclusion, respondent submits that the Petition for Writ of Certiorari should be denied because (1) the petition fails to show any reason why this Court should review settled matters of local law in the District of Columbia, (2) fails to show any reason for this Court to reconsider its decision in *Johnson* v. *Muelberger, supra*, and fails to show any issue in this case of sufficient importance to justify the time and attention of this Court.

Respectfully submitted,

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